No. 14,798

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES TAYLOR YOKELY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District of Alaska, Third Judicial Division.

BRIEF OF APPELLANT.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction in the District Court for the District of Alaska, Third Division. The appellant was charged in the indictment with unlawfully and feloniously conspiring with Lena Mae Wilkins to violate the laws of the United States, to-wit: Section 2422, Title 18, USCA, namely, transporting within a possession of the United States a female person on the line of an interstate carrier with the intent and purpose that said person engage in the practice of prostitution and debauchery. The

indictment contains two counts. On the first count of the indictment three specific overt acts were set forth alleging that the defendants did or performed certain acts on or about the 19th day of April, 1954. The second count of the indictment alleged that the defendants did or performed two specific overt acts in furtherance of the objects of the conspiracy on or about the 13th day of April, 1954. (See Record 3, 4 and 5.)

The appellant entered a plea of not guilty (R 6) and after a trial by jury he was found guilty of both counts of the above described offense and thereafter, on the 18th day of January, 1955, the appellant was sentenced to imprisonment for the term and period of five years on each count, said sentence of count two to run concurrently with the sentence imposed on count one, and said sentence to commence on the 30th day of December, 1954. (R 35.)

Motion for judgment of acquittal and new trial (R 33) was filed on January 10, 1955, and was denied on the 7th day of February, 1955. (R 38.) Notice of appeal was filed on the 10th day of February, 1955. (R 38.)

The District Court had jurisdiction to try the case by virtue of the provisions of 53-1-1 and 53-2-1 Vol. 2 ACLA 1949.

This Court has jurisdiction of the appeal by virtue of the provisions of Sections 1291-1294 (2) new Title 28 United States Code.

II.

STATEMENT OF CASE AND QUESTIONS INVOLVED.

1.

Facts and circumstances.

James Taylor Yokely became acquainted with Lena Mae Wilkins, the codefendant, on or about the 1st day of April, 1954, at which time both parties were in Anchorage, Alaska. James Taylor Yokely maintained a rooming house of sorts in which he also resided at 1806 East I Street, Anchorage, Alaska. The appellant and his wife separated in 1953 (R 360) and it appears that the appellant's wife was residing in Portland during the early spring months of 1954. According to the appellant's version of the situation, Lena Mae Wilkins resided at the dwelling or rooming house above mentioned, paying rent to James Taylor Yokely or William Kirby Yokely, who apparently rented the room to Lena Mae Wilkins in the absence of James Taylor Yokely. (R 316.)

Lena Mae Wilkins apparently had the run of the house in common with the other residents and upon occasion picked up the mail for the occupants of the Yokely house, or at least James Taylor Yokely's mail, which was addressed to General Delivery, Anchorage, Alaska. (R 346.)

On or about the 9th day of April, 1954, Lena Mae Wilkins journeyed from Anchorage to Fairbanks, Alaska, via Alaska Airlines, and there remained, according to the government's contention, for the purpose of prostitution, until on or about April 13, 1954. Thereafter she returned to Anchorage, remaining

over night at the Yokely residence, and thence went to Kodiak, Alaska, where she remained until on or about the 13th day of May, 1954, at which time she returned to Anchorage and took up residence in the Yokely house. She apparently remained in the Yokely residence until the 7th of September, 1954, when, in a state of anger (R 106) arising out of circumstances which are not crystal clear from the record, she made a statement implicating herself and James Taylor Yokely as co-conspirators, all as is set forth in the indictment at R 3 to 5, which closely parallels the factual circumstances as to travel therein recited. The statement made by Lena Mae Wilkins on the 7th of September, 1954, recited transactions in money and travel which were bolstered in some respects by evidence of the government.

No independent evidence was offered by the government in chief exclusive of Exhibit No. 1 (the September 7th statement of Lena Mae Wilkins R 167 et seq.) which in anywise tended to prove that Lena Mae Wilkins engaged in prostitution or intended to engage in prostitution or conspired with anybody else to do or perform any of said acts so alleged.

The last act consistent with the charge of conspiracy was alleged to have occurred on or about the 13th day of April, 1954.

One would be indeed naive if he did not concede from a reading of the record that Lena Mae Wilkins had at some time engaged in prostitution and that James Taylor Yokely was or had been, over the past several years, a man of leisure rather consistently

engaging in games of chance. It is not contended in this argument that the character of the appellant in this litigation was without blemish or that he had not at some time past had brushes with the law. However, as is frequently the case and as has been indicated by the court in practically every case reviewed, the past conduct of the defendants left something to be desired. In no case that the appellant has reviewed, was the character of the defendant as a moral risk considered by the court as germane to the issue except in a possible few cases where motive or intent was shown by such conduct, and then only as connected to the facts charged in the indictment.

As will be seen by the record, Lena Mae Wilkins, represented by counselor John Dunn, on trial, stood mute throughout the proceedings. The defendant James Taylor Yokely was represented by counselor Seaborn J. Buckalew, took the stand on his own behalf and generally denied any participation in an alleged conspiracy.

The statement of Lena Mae Wilkins made September 7, 1954, was admitted in evidence over the objection of defense counsel and is the main bone of contention so far as this appeal is concerned, for without that statement, the government had no case against James Taylor Yokely.

2.

Questions involved and how raised.

A. Whether or not there was sufficient evidence to justify a verdict of guilty.

This question was raised by a motion by counsel for the defense at the conclusion of the government's case for a dismissal of the indictment and by a motion for a new trial.

B. Questions raised on the admission or rejection of evidence.

These questions were raised by objections made at the time of the ruling of the trial court.

C. Questions raised by the instructions of the trial court and refusal of the trial court to give certain instructions requested by the defense.

III.

SPECIFICATIONS OF ERROR.

(a) That the court erred in denying defendant James Taylor Yokely's motion for a dismissal of the indictment, which was in effect a motion for a directed verdict, made at the close of the government's case. (R 310.)

(b) That the court erred in denying defendant's motion for a new trial. (R 33 through 39.) This question was raised by motion of counsel for the defendant (R 33) filed on the 10th day of January, 1955, and which was denied by the court on February 7, 1955. (R 38.)

(c) That the verdict is contrary to the weight of the evidence and is not supported by substantial evidence is a general issue and raised throughout the

trial by various motions of the defense aimed at the admission of government's exhibit No. 1, without which the government's case must of course fail. (R 310 et seq., R 408 et seq.)

(d) That the court erred in giving instruction No. 12 (R 22) and likewise erred in failing to give defendant's proposed instruction No. 1. This question was raised by objections and exceptions. (R 407.)

(e) That the defendant was substantially prejudiced and deprived of a fair trial by reason of the comment of the prosecuting attorney on the failure of Lena Mae Wilkins to take the stand. This question was raised upon motion of the defendant (R 33) but is not urged in this brief with particularity for the reason that the record was not extended to cover the argument of counsel and that the other considerations, in appellant's opinion, make it unnecessary to consider that particular error other than to call it to the attention of this Court as being before the Court on the occasion of the motion to fix bail pending appeal.

(f) That the court erred in admitting government's exhibit No. 1. This question was raised by appellant's counsel at R 70 and was urged with consistency throughout the trial on the basis that the conspiracy did not extend beyond the general time limits of the indictment.

IV.

ARGUMENT.

1. INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT.

That there was insufficient, substantial or proper evidence before the jury seems at first glance to require little argument. In order for the government to prove its case against the appellant, it must of a certainty prove beyond a reasonable doubt that the defendants first conspired to violate the laws of the United States of America as named and set forth in the indictment, counts 1 and 2, and that they later entered into acts pursuant to said conspiracy and that they did do some acts for the accomplishment thereof or attempted to do the same. The government in chief called seven witnesses. In order they were Sachen, Briggs, Baker, Dizney, Martin, Buckles and Johnson. None of these witnesses was able, by proper testimony, to establish that the defendants, or either of them, actually committed any immoral or illegal act. The testimony of Sachen dealt almost in its entirety with his activities on September 7, 1954, outlining in detail the methods and means of taking the statement from Lena Mae Wilkins, later introduced as government's exhibit No. 1. But outside of the statement itself, it can be conceded that Sachen had no personal knowledge nor obtained any positive knowledge in respect to which he gave testimony in regard to the offense charged against the appellant in the indictment.

Briggs (R 236), Baker (R 245), Dizney (R 262), Martin (R 291), Buckles (R 303) and Johnson (R

308) gave testimony of isolated, disconnected facts, none of which facts, standing alone, would constitute evidence of the commission of any crime, let alone proof of the crime charged in the indictment. Taking the combined substance of the government witnesses' testimony in chief, there was a complete lack of proof of competent evidence to sustain the conviction of the appellant, excluding, of course, government's exhibit No. 1.

What then did the combined testimony of the government's wtinesses in chief accomplish? Appellant contends that the combined testimony of the government's witnesses in chief had the effect of setting the stage whereupon government's exhibit No. 1 was to lift itself by its own boot straps.

Mr. Kirkland, after reviewing briefly the language of the indictment in his opening statement to the jury, referred to a sworn statement of Lena Mae Wilkins that was to be introduced in evidence and after the court sustained the objection of Mr. Dunn to such comments before that evidence was admitted, Mr. Kirkland went on despite the ruling of the court and stated as follows:

> "Very well. The Government will offer testimony from competent witnesses that this defendant, Lena Mae Wilkins, did everything that is alleged, along with the defendant, James Taylor Yokely, and the various other things which she made in a statement and there will be testimony to that effect. *And right down the line this statement will be corroborated as to the various*

details, even down to telegrams that were signed." (Emphasis added.) (R 62.)

Then and there the government disclosed a pattern of demeanor which was to be followed throughout the trial. Though no foundation was laid, the government did in fact obtain the admission of exhibit No. 1 over the objection of counsel, proceeding with testimony which could do no more than add stature to its own exhibit No. 1 and which did not show that the information contained in Exhibit No. 1 was true, or even proper, but attempted to show that it was possible. The same pattern of conduct was followed by the government in its obvious effort to blacken the character of the accused and before any shred of evidence was ever presented to the jury, indeed before any witness was ever called on behalf of the government, Mr. Kirkland labelled Lena Mae Wilkins as a prostitute, stating to the jury that defense counsel had stipulated to the fact that Lena Mae Wilkins was a prostitute. The rank prejudice visited upon the defendants is best shown by the language of Mr. Kirkland at R 62:

> "I don't think that it will now be necessary that I prove she is a prostitute. I believe counsel has stipulated to that fact, or at least has admitted it to the jury."

Appellant contends that Mr. Kirkland's statement was most unfair and improper by reason of the fact that nowhere in the indictment was Lena Mae Wilkins charged with being a prostitute and accordingly

the government was only doing indirectly what it could not do directly, namely, taking every opportunity to besmirch the character of either or both of the defendants. The appellant challenges the government to show where in the record such a stipulation or admission to the jury was made as a foundation for Mr. Kirkland's statement.

While it occurred after the chief examination of the government, Mr. Kirkland was not content to besmirch the character of the defendant James Taylor Yokely, but he had to inquire as to whether or not Yokely's wife was a prostitute (R 357) and Mr. Kirkland, not satisfied with proof of the indictment, at R 360 apparently wanted to establish that the appellant Yokely had evaded his income tax.

The government further, in calling its first witness, Mr. Sachen, after exactly 11 questions and in less than two full pages of testimony on the part of the FBI investigator and chief witness Joseph B. Sachen, in response to a question on behalf of the government, adduced the following testimony on behalf of the government at R 69:

> "On the morning of September 7 when I appeared in my office there was a note for me stating that Lena Mae Wilkins was down at Honnicutt's and wished to give me a statement regarding her being transported by James Yokely for the purpose of prostitution."

As will be seen by R 69, Mr. Dunn objected to the witness' answer as hearsay and asked that the answer be stricken. The trial court sustained the objection

of Mr. Dunn after some argument at R 70 but never instructed the jury to disregard the hearsay statement of the witness Sachen above quoted.

The trial court at R 71 was ready to overrule Mr. Buckalew's objection that government's exhibit No. 1 was hearsay and inadmissible against the defendant Yokely, as will be seen by the court's statement. (R 71.) The court at that point was willing to rule in favor of the government but decided to hear argument on the matter and the only argument in favor of admission of government's exhibit No. 1 had been given by Mr. Kirkland as follows:

> "The law would uphold the statement the defendant made would not be hearsay. Only the truth of those statements would be hearsay and is a matter for the jury to decide." (R 70.)

Whether this profound statement on the part of government's counsel had any effect upon the trial court is something which we will probably never know but hardly could Mr. Kirkland have made a statement that was more incorrect.

It was not enough the court allowed the unexpunged hearsay statement of the witness Sachen at R 69 to stand unstricken, but the trial court allowed improper arguments of law to be conducted on behalf of the government at R 72 and 73 after Mr. Buckalew had requested the court to excuse the jury at R 72.

At this point in its argument, the government, through Mr. Kirkland, was giving treatment to the case of *Simpson v. United States,* 289 Fed. (2d)

188. It is contended that if indeed the government understood the rule of law pronounced in *Simpson v. United States,* that certainly the same was never clearly stated in the record before the jury and prior to their being excused from exposure to arguments of law to the court at page 74 of the record. The court, by allowing such argument, submitted the jury to incorrect and prejudicial statements of counsel in respect to the law properly governing their consideration.

The quotation given by Mr. Kirkland at R 72, as lifted from the *Simpson* case, was indeed a partial, out-of-context quotation of the Ninth Circuit majority opinion and was taken from 16 Corpus Juris Criminal law at page 663, section 1320 and if indeed the government did not care to quote further from the Ninth Circuit opinion to determine what the court had in mind by citing 16 CJ 663, it might at least have read the following section in 16 CJ at 663, section 1321, which reads as follows:

> "Where a party to a conspiracy abandons such conspiracy, his subsequent declarations with respect thereto are not in furtherance of its object, but are in the nature of admissions or confessions, and are not admissible against the other conspirators."

There was much more to the *Simpson* case than was indicated by the government in its argument to the court on trial. It will be remembered from that case that there was no evidence whatsoever that on the

morning following the Sylph's capture that the alleged conspirators intended to abandon their efforts to bring their cargo of intoxicating beverages into Alaskan waters and indeed everything indicates in that case that had they been able to post the $800.00 fine or bail, as the case may be, that they would have been allowed to remove the Sylph from Canadian waters and to pursue their unlawful adventure. This point was clearly brought out in the majority opinion of the court as a factor of great magnitude in its determination.

In the pages of the record from 68 to 84 the appellant has sought to determine the thinking of the trial court or the argument of the government upon which the trial court premised its decision to admit into evidence government's exhibit No. 1. It appears manifest to the appellant that the government's counsel did not advance convincing argument on the matter, for hardly could it be said that the government's argument was convincing when the government's statement of the law was inaccurate, or to say the very least, incomplete. Although the appellant has been unable to determine where in Mr. Kirkland's argument the theory was developed, it is interesting to note the position taken by the trial court at R 77, which reads as follows:

> "The Court. Excepting this: Mr. Kirkland argues they may not make a statement after the conspiracy unless it reverts back to the acts done at the time of the conspiracy. I think that is the point you have overlooked. * * *"

Further quoting the Court:

> "Of course, under what you state to the court it is obvious there is a difference as to the point of time. Then you haven't argued the point, counselor. You haven't met the argument, as I see it, that Mr. Kirkland has propounded. That is, the general premise of conspiracy cannot be brought into evidence if by chance it comes after, but it may be admitted if by chance it reverts back to the time that the acts were in fact committed and for which the defendants are charged."

If appellant understands the trial court correctly, it did no more than state, unless the statement or testimony concerns some act involved in the alleged conspiracy it is not admissible, which of course is true, but is made true not because of the special rules as they apply to the statement or actions of alleged conspiracy but because testimony, in order to be admissible, must be relevant. Naturally a witness could not give testimony in respect to a matter not under consideration by the court for the simple reason that it would violate the rule of relevancy.

It is further contended that the argument of defense counsel at R 75 citing *United States v. Groves, et al.,* 122 Fed. (2d) 87, and to a lesser extent the *Ellis v. United States* case, cited at 138 Fed. (2d) 612 (it is to be noted that at record 75 the *Ellis* case is not shown to be cited in Fed. 2d), are proper authority for exactly the proposition that the defense was urging upon the court.

Appellant, in reading the trial court's discussion with counsel in the record, 68 through 84, is led to the inescapable conclusion that the trial court erred in sustaining the government's position without adopting as its own, argument of the government and upon grounds which lack the minimum blessing of candid definition. That defense counsel recognized the lack of clarity in this respect is disclosed at record 79 by Mr. Dunn when he addressed the court in the following language:

"May I take another crack at it?"

Further evidence that the government persistently attempted to blacken the character of the defendants by any means available, regardless of the admissibility or inadmissibility of the evidence, is shown at R 317 et seq. when Mr. Kirkland, in his cross examination of William Kirby Yokely, in regard to the Yokely residence, stated as follows:

"Q. Is that house a bawdy house?

A. No.

Q. Has anyone ever been arrested in that house charged with maintaining a bawdy house?

Mr. Dunn. Objection, your Honor. It couldn't possibly be a proper question. It is going again to my objection of being convicted of a crime. Counsel has some leeway and he is just broadening it.

The Court. In that respect the court was reading a note from the secretary. Would you please read the question back?

(Thereupon, the reporter read the question Line 6 above.)

Mr. Dunn. Let him ask the witness whether or not this witness has ever been arrested there. He can do that, I suppose, under the court's ruling, although I think it is an improper question, too.

Mr. Kirkland. I am not trying to attack this witness' integrity. Counsel brought out how he rented the room, etc., and I then wanted to go into detail surrounding the renting of this room. I then asked this witness if that house was a bawdy house and his answer was, no. I then asked him if anyone had been arrested out of that house and charged with maintaining a bawdy house at that particular address.

The Court. Objection overruled. You may answer."

Not only was the district attorney allowed to ask an improper, prejudicial, irrelevant question but the same was read back to the jury and Mr. Kirkland, in the quoted language above, again restated the substance of everything that had been asked by him in the first instance, re-read by the court reporter and accordingly the government's counsel three times placed before the jury prejudicial matter tending to show that the neighborhood or the dwelling in which the Yokelys lived was commonly known as a bawdy house.

Appellant has previously stated that the case in chief of the seven witnesses called by the government in discharging its burden of proof against the alleged conspirators, was by a recitation of disconnected, isolated instances which did nothing more than prove the possibility of the truth of government's exhibit No. 1.

The testimony of the witness Sachen, as appellant sees it, dealt almost entirely with the obtaining of government's exhibit No. 1.

Morris L. Briggs, at R 236, et seq., was the means for the introduction of proof that registered letter No. 1813 had been mailed by an unidentified person from Kodiak, Alaska, on April 19, 1954, as will be seen by the following response at R 243:

> "Q. And who in fact mailed it. It is in fact unknown to you. Is that true?
>
> A. That is correct. I personally do not know.
>
> Q. As far as you know anybody in Kodiak could have mailed that letter?
>
> A. I didn't see it mailed."

The records of the Kodiak Postmaster became government's exhibit No. 2 and while they proved nothing so far as the indictment was concerned, it obviously was intended to support paragraph 10 of government's exhibit No. 1 found at the bottom of R 169.

Forbes D. Baker, of Alaska Airlines, called on behalf of the government, was the means through which the government introduced its exhibit No. 3, reflecting that a passenger by the name of Mickey Wilkins boarded flight No. 4 on the 14th day of April, 1954, and travelled from Fairbanks to Anchorage by virtue of ticket bearing form 272, No. 32269S. Forbes D. Baker further testified that he had seen Yokely and Miss Wilkins in Fairbanks in the summer of 1954. However he was unable to state under oath that he had seen the two defendants together on any particular occasion. He had been shown, by FBI agent

Woresham, during the course of investigation, pictures of the two defendants, at which time he had told the FBI agent at R 253:

> "As I recall, I told the person who questioned me, that when I did see the picture, that I have seen the woman before, and I was quite sure she had traveled on our airline."

This testimony obviously intended to make possible the government's proof of paragraph 9 of exhibit No. 1. (R 169.)

Through witness Clarence Dizney, the Deputy United States Marshal at Kodiak, Alaska, the government attempted, apparently to introduce evidence in respect to the defendant Miss Wilkins in regard to her reputation for *common fame* and over the objection of defense counsel to this type of testimony found at R 263, the court made this obfuscate statement:

> "Reputation is limited to reputation; however, it is a case of prostitution. I do think that the question of character does come into consideration other than normally admitted. Ordinarily it's a question of reputation. Very well, you—objection is overruled. You may inquire."

After much argument, objections and quite obvious confusion between R 263 and 272, we have the following instruction by the court:

> "Well—but then, we must abide by the rules. Now, the court instructed you to ask that question, Mr. Kirkland, as outlined by the court.
>
> Q. What was the defendant, Lena Mae Wilkins, general reputation for morality and decency in Kodiak, Alaska, at that time?

A. It did not comply with Territorial laws at that time.

Q. *Thank you, sir.* Did you go out to have a discussion with her?

A. Yes. From the information I did interrogate her about her work.

Q. Now, will you tell the court what took place at that discussion.

Mr. Buckalew. Your Honor, I am going to object to it on behalf of the defendant, Yokely, on the ground it's hearsay.

The Court. Objection overruled. You may answer. It's a question of conspiracy, Mr. Buckalew.

Mr. Buckalew. Sir?

The Court. It's a question of conspiracy; that is, the indictment. Therefore, as I pointed out this morning, in ruling of admissibility of that evidence, that that statement of one could conspire, or can bind the acts of another.

A. I did discuss with her the problem of her getting employment in Kodiak. At that time she stated she did not have any regular means of livelihood. I asked her if she intended to do so. She said, yes. And that in general was our conversation and my interrogation of her to find out where she was from, she said to me she was from Fairbanks. She had been in town a short time and a short time later, she left town."

Appellant contends that the testimony of the witness Clarence Dizney proved nothing to support the indictment as charged against either of the named defendants, and that the testimony of Clarence L. Dizney reflects opinion and hearsay which was im-

properly admitted. About all that the witness Dizney proved was that Miss Wilkins was in Kodiak on April 28, 1954 and left some time in May, the 10th, 11th or 12th.

About all that can be concluded from the testimony of the government's witness, Capt. Doyne K. Martin, of the Alaska Communications System, is that through him government's exhibits Nos. 4 and 5, generally consisting of telegrams and telegraphic money orders, were admitted, and that the telegrams were regular on their face. The witness further testified that it was the standard practice and rule of procedure of the Alaska Communications System that telegraphic money orders be received by a person who identifies himself as the proper recipient and that if a woman attempted to transmit funds by telegraphic money order in a man's name, this information would be noted on the application. In substance this testimony is given by the witness Capt. Martin at R 299. The net effect of Capt. Martin's testimony is to support or bolster paragraph 14 of government's exhibit No. 1. (R 170.)

Through the government's witness Gilbert R. Buckles, station manager of Pacific Northern Airlines, government's exhibit No. 6 was introduced, which, in effect, represented two segments of travel of one Mickey Wilkins; the first being a departure at 8:35 A.M. on the 15th day of April, 1954, flight No. 16, Anchorage to Kodiak; and the second being a segment of travel of Lena Mae Wilkins, May 12, 1954, at 5:45 P.M. Plane No. 465, ticket No. 311-

75810, Kodiak to Anchorage. (R 306.) This witness' testimony obviously was intended to bolster the statement of Miss Wilkins, government's exhibit No. 1, at paragraphs 9, 10, 11, 12 and 13, found at record 169 through 170.

The government's witness Olaf Johnson, Deputy United States Marshal, added nothing new to the testimony of any of the witnesses and was in substance that Lena Mae Wilkins resided in March of 1954 with Marvin Clark and that she was residing in the month of April, 1954 at 1806 East I, Yokely's house. (R 308.)

The government's case in chief concluded with the admission of exhibit No. 7 at record 309 over the objection of defense counsel, and while it is not clear from the record exactly what exhibit No. 7 showed on its face, it is obvious that ticket No. 11616 must have shown transportation of James Taylor Yokely from Anchorage to Fairbanks, or purported to show such transportation. The exact date of that exhibit is nowhere shown in the case in chief of the government. The appellant believes that the court erroneously allowed exhibit No. 7 to come in over the objection of defense counsel. (R 309.)

Appellant contends that counselor Buckalew at record 310 and 311 properly moved the court for a dismissal of the indictment and in plain and precise language urged the court for a direction as to James Taylor Yokely which should as a matter of course have been granted under the well established rule of *Logan v. United States.*

2. ERRORS IN THE ADMISSION OF EVIDENCE.

On the admission into evidence of government's exhibit No. 1.

Government's exhibit No. 1 consisted of a statement allegedly made voluntarily by Lena Mae Wilkins on the 7th day of September, 1954 and is found at R 167 through 171.

The record fully discloses the objections of the defendants to the admission of this evidence and the substance of Mr. Buckalew's exception on behalf of the appellant is stated at R 71 where he took the position that government's exhibit No. 1 was purely hearsay and stated as follows:

> "If the conspiracy did exist it certainly had terminated on the 7th of September and it is my understanding of the law of conspiracy that there must be—for any statement made by Mrs. Wilkins to be admissible against Yokely it must have been made during the life of the conspiracy. This statement was made after the conspiracy terminated and it is clearly hearsay and inadmissible."

The court heard considerable argument of counsel wherein the government cited the Ninth Circuit Court of Appeals case of *Simpson v. United States* found at 289 Fed.(2d) page 188, and the defense cited *Ellis v. United States,* and *United States v. Groves, et al.* The substance of appellant's argument was that the alleged conspiracy had ended long prior to the date of September 7, 1954, and it is a simple matter of computation that four months and 25 days had expired

since any of the overt acts named or set forth in counts 1 and 2 of the indictment against the defendants. It will be recalled by the court that the indictment in the *Simpson* case was a general indictment setting forth a pattern of conduct without any particular time limitation whereby the conspirators were to have agreed or planned or conspired in the use of American licensed gas boats of at least ten tons burden, thence proceeding into foreign waters to secure cargo of intoxicating liquors and to return to ports in the Territory of Alaska. The court in the *Simpson* case first determined that the general allegations of the indictment were sufficient, and since the parties were charged with a general conspiracy it had a compelling effect upon the court in making the *Simpson* decision.

It is further to be noted that the argument of counsel during trial indicated that the parties did not fully understand the facts of the case. Nowhere was it indicated in the argument of counsel before the trial court that the alleged conspirators of the *Simpson* case were not in the custody of United States officials at the time the statement was made and this Court, in rendering the opinion, clearly indicated that the conspirators were not thwarted in their plan in any respect, since they were overhauled by a Canadian customs vessel, for the violation of Canadian navigation laws. It will be recalled in that case that there was no licensed skipper aboard, among other things.

Whether or not counsel properly explained the *Simpson* case to the trial court, or whether the trial

court used the *Simpson* case as a basis for its determination to admit government's exhibit No. 1 is moot. However, we do think it worthy of note that the *Simpson* case, decided in this court, was not without its dissent. In that case Judge Rudkin was of the firm conviction that the case should be decided on the basis of *Logan v. United States of America,* 144 U. S. 263, which laid to rest the question there presented. We do not now urge that the law as laid down in the *Simpson* case is erroneous as applied to the facts there presented, but we do urge that the *Simpson* case has no compelling force on the determination of the question here presented.

Now, as a general proposition it can be conceded that out-of-court statements such as we find in government's exhibit No. 1 are hearsay evidence and that their admissibility in a court of law, under certain circumstances, is an exception to the hearsay rule. It necessarily follows that when an exception is granted by our courts of law, to the well established hearsay rule of evidence, such exception would not be without its guards and conditions to protect such an exception from abuse. What then is the rule? Although it may be stated in a positive or a negative form, positively stated it is in substance as follows (emphasis added):

> *"Any act or declaration of one co-conspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every co-conspirator provided that a foundation for its reception is laid by independent proof of the conspiracy."*
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> Vol. 52 Michigan Law Review, June 1954. No. 8, page 1161.

There are accordingly three measures of admissibility, or three safeguards in the application of this exception to the hearsay rule: **furtherance, pendency** and **foundation.** Why, we might ask, do the decisions establish that the act or declaration, to be admissible, must be in the furtherance and during the pendency of the conspiracy? While it may not be clear from the decisions, it seems that it could be conceded that the sense of the court, whether based upon principal-agency or upon the theory of master and servant, honor among thieves or whatever other rationale may be applied in determining the rule, the courts have been well justified in reaching that conclusion, if for no other reason than on the basis of knowledge of the common affairs of men. It is a matter of common knowledge that statements are most apt to be blessed with candor and credibility when they are spontaneous and given without hope of reward, detriment of malice or fear of punishment. It is at least not uncommon that a discharged agent, a retiring dissatisfied partner or an aggrieved person in the ordinary intercourse of business relations might, after the conclusion of a sour business venture, make harsh, uncharitable and even untrue statements of a former associate. Those statements of course should not be given the same weight or credibility as statements made during the course of pleasant business affairs, because they may be super-induced by the natural human emotions and feelings experienced by all mankind. This is no less true in the case of the dissolution of a marriage; it is not infrequent, it is almost

the rule, that the statements of the complaining party to a marriage, made after the marriage has become shipwrecked, must be viewed with caution and oftentimes utterly disregarded.

These, or some of these elements, undoubtedly have influenced the court in establishing what the appellant contends is the controlling law of the case at bar. That law was well established in the case of *Logan v. United States,* 144 U. S. 263, decided in the Supreme Court of the United States on April 4, 1892, coming on error to the Circuit Court of the United States for the Northern District of Texas. Time will not be spent reviewing the facts of this case, which read like the script of a western thriller involving the waylaying and slaying of prisoners in custody of the law, shackled two by two in irons, and the successful escape of a part of those prisoners. Upon the trial of alleged co-conspirators there was evidence tending to show that Johnson, one of the alleged co-conspirators, while lying wounded at his home after the fight, at the solicitation of some of the defendants, for publication in a newspaper, gave a statement that Logan was one of the guards at Dry Creek on the night of January 19th. The defendants objected to the admission of this evidence, among other grounds, because the declarations were not made in Logan's presence, and were made after the crime had been committed and the conspirators had separated. The trial judge overruled the objection and admitted the evidence and the defendants excepted to its admission. The Supreme Court ordered a new trial on the grounds that

the admission of this incompetent evidence of such acts of Logan prejudiced all defendants and entitled them to a new trial. We quote then merely from the syllabus which is a clear and concise statement of the law established by that case and which has been cited as authority ever since.

> "Upon an indictment for conspiracy, acts or declarations of one conspirator, made after the conspiracy has ended, or not in furtherance of the conspiracy, are not admissible in evidence against the other conspirators."

The statement from the syllabus of the *Logan* case might be what we would designate as a negative statement of the law as compared to what we have previously stated was positive, but in substance the same elements, safeguards or requirements stand as lamp posts to guide and light the path of the court in determining the admissibility of ex-parte, non-judicial statements made by one of the alleged co-conspirators.

It is not difficult to find cases in which the ex-parte, out-of-court statement, although made in closer proximity to the alleged overt acts, was disallowed by the court. Such a case is *U. S. v. Kovonsky,* 202 Fed. (2d) 721, decided March 9, 1953, CCA 7th, which followed the *Logan v. United States* case, as can be seen by the following language:

> "To be admissible against others than declarant, a declaration must not only be made while conspiracy charged is pending but must also be in furtherance of object of conspiracy and by some one embraced within it." (taken from the syllabus.)

It can be conceded that in the *Kovonsky* case, the party giving the ex-parte, out-of-court statement was not, by the evidence, well tied in to the alleged conspiracy and there was some doubt, as was expressed by the court, in determining that the maker of the statement was in fact a police officer and it can be further conceded that in that particular case that the court was troubled by the lack of another element arising out of the formula of safeguard, long established by the court, that is, foundation and independent proof.

So, too, was the court in *Montford, et al., v. United States,* cited at 200 Fed. (2d) 759, decided in the Fifth CCA December 29, 1952, confronted with lack of independent proof or foundation as can be seen by the following statement of the court in that case made:

> "The declarations of one conspirator, made in furtherance of the objects of the conspiracy, and during its existence, are admissible against all members of the conspiracy.
>
> The connection of a defendant with a conspiracy cannot be established by the extra-judicial declarations of a co-conspirator, made out of presence of defendant, and *there must be proof aliunde* of existence of the conspiracy and of defendant's connection with it, before such statements become admissible against defendant not present when they were made." (emphasis added.)

In the *Montford* case there was no question but what the conspiracy, if such it was, was in existence

at the time of the alleged statements by reason of the fact that it was admitted that the various named defendants were participating in illicit barter and sale of intoxicating liquor at the time of the alleged statements and accordingly while the same point is not raised in the case at bar, the law of *Logan v. United States* remains controlling.

A case which more closely resembles the facts of the case at bar and which likewise follows the well established rule laid down in *Logan v. United States,* is the case of *Fiswick, et al. v. United States,* cited at 329 U.S. page 211, on certiorari, to the Circuit Court of Appeals for the Third Circuit, decided December 9, 1946. For a brief statement of the holding of the court we quote syllabus No. 1 thereof:

> "Petitioners and others were indicted for conspiracy to defraud the United States in violation of section 37 of the Criminal Code. The indictment charged that petitioners conspired with each other, and with others, to defraud the United States by concealing and misrepresenting their membership in the Nazi party. The last overt act alleged to have been committed by any of the petitioners was the filing by one of them of a registration statement under the Alien Registration Act of 1940, in which he falsely failed to disclose his connection with and activities in the Nazi party. Held that the conspiracy charged and proved did not extend beyond the date of the last overt act, and that admittance in evidence against all of the petitioners of admissions made after that date by one of the petitioners was reversible error."

In that case the nature and the duration of the conspiracy was of great importance for the reason that each petitioner, after he was apprehended, made damaging statements to the federal agents. These statements were made during the course of the years of 1943 and 1944 and implicated all or a part of the other alleged co-conspirators. In the first instance each of these statements was admitted only against the maker but at the close of the government's case the District Court ruled that each of these statements was admissible against each of the other co-conspirators and so the jury was charged. The court in reviewing this action, noted that the last overt act charged in any of the indictments was the act of Mayer, one of the defendants, in his registration statement on December 23, 1940 and accordingly the Supreme Court held that all continuity of action ended with the last overt act of December of 1940. Mr. Justice Douglas, in delivering the opinion of the court, again cited with approval *Logan v. United States,* and in reversing the conviction of the Third Circuit Court of Appeals, took the position for the court that one could not say with fair assurance that in so instructing the jury and allowing the testimony to stand, that is, as to the out-of-court admissions, that the jury was not substantially swayed by the use of the admissions against all petitioners. The court further said that it was not enough to say that there may be a strong case made against each petitioner. The indictment charged the conspiracy and not the substantive crime of falsely registering. The evidence

that the petitioners conspired with each other was not at all strong. So it is in the case at bar.

Mr. Justice Douglas, in delivering the opinion of the court, quoted *Kotteakos v. United States,* 328 U.S. 750 as follows:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from the constitutional norm or a specific command of Congress. * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so or if one is left in grave doubt, the conviction cannot stand." *Kotteakos v. United States,* 328 U.S. 750, as cited in the *Fiswick* case.

While it was a civil case and may not be particularly in point, this Court did, in *Burnham Chemical v. Borax Consolidated, Ltd.,* 170 Fed. (2d) 569, decided CCA 9th, October 27, 1948, treat with the concept of an overt act. In that case the plaintiff in the trial court attempted to show that it had been damaged by actions of the defendant in violation of the anti-trust laws between the dates of May 17, 1929 and October 10, 1939, but had brought the suit much later than those dates and attempted to show an overt

act out of what court and counsel described as "the little placer" incident. It will be recalled that this court, with very slight modification, affirmed the judgment of the lower court. While this particular case may not have any moment or be of any aid in connection with the determination of the case at bar, it is called to the attention of the court merely by reason of the fact that the court there concluded, as appellant sees it, that an overt act in connection with any transaction must be a fundamental act, an act of some magnitude and import bearing a direct relation to the prime transaction or incident involved before the court for consideration. The "overt acts" in the case at bar lack this distinguished feature.

Appellant has, we think, established with certainty that the case at bar is not controlled by the rule of the *Simpson* case, which was apparently the bulwarks of the government's argument for admissibility of its exhibit No. 1, which case appellant contends the government improperly treated before the trial court. We point out again that the indictment in the *Simpson* case, as compared to the case at bar, is vastly different. The *Simpson* case sets forth an indictment in general language embracing a pattern of conduct which apparently could have extended over three years time, as allowed by the statute of limitations, whereas in the present case, in order for a conspiracy to have existed, the formula herein announced would of necessity require the trial court to apply the formula of pendency and furtherance to the language of counts 1 and 2 of the indictment, or some reasonable

interpretation thereof. Appellant maintains that the court erred and that such formula was not applied.

We have ample proof of the wisdom of the prior courts in establishing the safeguards when we consider the record before us, wherein it was admitted by the witness Sachen, chief witness for the government, in referring to the demeanor and the state of mind of Lena Mae Wilkins on the day that she gave the government's exhibit No. 1, as follows:

> "I know she was angry. She seemed like she was angry with Yokely, yes." (R 106.)

This is but one of the considerations that the courts have had in mind in establishing the safeguards to the exception in respect to the hearsay rule herein propounded by the appellant. That Lena Mae Wilkins and James Taylor Yokely may have indulged in sordid conduct or that Lena Mae Wilkins may have had reason to be angry with Yokely, or that they may have committed some breaches of substantive law, is not for us here, nor was it for the trial court, to consider. It was only the consideration of whether or not the defendants were guilty of the conspiracy charged and whether that offense charged could be proved by competent evidence.

We borrow from the language of Mr. Justice Jackson in his dissenting opinion of *Lutwak v. United States,* 344 U.S. 617, which stated in part as follows:

> "Whenever a court has a case where behavior that obviously is sordid can be proved to be criminal only with great difficulty, the effect to bridge the gap is apt to produce bad law."

Assuming for the sake of argument that the trial court could have possibly admitted the statement contained in government's exhibit No. 1 as against the maker Lena Mae Wilkins, would it be possible to erase the damaging effect thereof as against the appellant by instructions, and if so, did the court's instructions accomplish that purpose? Appellant thinks not. The instructions of the court which could be most favorably viewed by the government to correct the manifest error of allowing government's exhibit No. 1 to be considered by the jury, on their deliberation as to the guilt or innocence of the accused as charged in the indictment, counts 1 and 2, are found in instructions Nos. 5, 9 and 12 at R 17, 20 and 22 respectively. The court's instruction No. 12, R 22, reads as follows:

> "In this case, two defendants have been jointly indicted for the alleged crime of conspiracy. You are instructed that no acts or admissions of either of the defendants done or made out of the presence of the other after the termination of the alleged conspiracy, may be considered by you in determining the guilt or innocence of the other. It is for you to decide from all of the evidence the date of the termination of the alleged conspiracy."

3. THE COURT ERRED IN GIVING INSTRUCTION NO. 12 AND IN FAILING TO GIVE APPELLANT'S PROPOSED INSTRUCTION NO. 1.

Appellant contends that instruction No. 12 was erroneously given in that it is premised upon an assumption of facts inconsistent with the proof. The court there in effect says that there is great doubt in

its mind after hearing all of the evidence as to whether or not the alleged conspiracy was in existence at the time of the making of the September 7th statement by Lena Mae Wilkins; that there should be any dispute of the fact, or that the court should have been troubled in regard to that fact, is negatived by the record, for it is almost inconceivable, as appellant believes, that the court could have been in doubt or should have been in doubt, after hearing some 75 pages of recorded testimony, that is R 89 to 165, out of the presence of the jury, dealing with the circumstances of the making of government's exhibit No. 1. The court, as appellant believes, in overruling objection of Mr. Buckalew, made an erroneous statement of the law which, in appellant's mind, contradicts the effect of instruction No. 12. The language of the court at R 273 is as follows:

> "The Court. It's a question of conspiracy; that is, the indictment. Therefore, as I pointed out this morning, in ruling of admissibility of that evidence, that that statement of one could conspire, or can bind the acts of another."

It seems obvious that the court reporter may not have properly understood the court's statement, which could and most likely was understood by the jury to mean that since the indictment charged conspiracy, the statement of one of the conspirators could be considered as evidence against the other without restriction.

The language above quoted, if appellant has interpreted the record correctly, undoubtedly conveyed

the impression to the jury early in the trial and long before instructions were given, that any act or declaration of one alleged conspirator could be used and was proper evidence against the other. This of course is not the law, and utterly disregards the safeguards established by the decisions of the courts in promulgating the exception to the hearsay rule of evidence generally applicable in trials involving conspiracy.

It is obvious that defendant's requested instruction No. 1 properly recites the law as established in the *Logan* case and it is to be noted that the authority of the *Logan* case was affixed to the requested instruction. That instruction or the substance thereof should have been given. The trial court's refusal to do so was error.

CONCLUSION.

Appellant contends that the record is clear and unmistakable that the statement of Lena Mae Wilkins, made four months and 25 days after the termination of any alleged conspiracy, was clearly not within the exception to the hearsay rule of evidence permissible in conspiracy cases, and that the allowance in evidence of government's exhibit No. 1 was error and without which the government had no case against the appellant, and that no amount of instructions, however carefully couched in wisely chosen language, could remove from the minds of the jury the dam-

aging effect thereof so far as the appellant Yokely was concerned.

The judgment of the lower court should be reversed.

Dated, Anchorage, Alaska,
January 27, 1956.

Respectfully submitted,
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